Ogletree Deakins

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The Practical NLRB Advisor

A *Hy-Brand* can of worms

In this Issue

Acme Co. was eager to revisit its labor supplier agreement with WeHelpU, Inc., which expired December 31, 2017. Acme has been contracting with the staffing agency for nearly a decade to provide additional workers when cyclical demands required the manufacturer to ramp up production for two- or three-week periods, several times a year. Acme had always insisted that its contract with WeHelpU required WeHelpU employees to comply with the rules and conduct set forth in Acme's employee handbook, and also to require WeHelpU employees to obtain advance approval from Acme management before working overtime. Acme never had to invoke either provision over the course of its relationship with WeHelpU, but the presence of these contract terms provided reassurance to Acme that it could fully manage its facility operations and rein in its labor costs.

In an abundance of caution, however, in 2016, the legal department revised the company's longstanding agreement with WeHelpU. Acme's outside counsel had advised the company to review its labor supplier contracts and to remove any provisions that might suggest that the company is "exercising control" over WeHelpU's workers. The reason, the company's attorney explained, was "a horrible decision by the Labor Board" that put Acme at risk of being legally liable, along with WeHelpU, for its contingent workers. As a result, Acme eliminated these and other provisions from its WeHelpU contracts in 2016 and 2017.

HY-BRAND **continued on page 3**

BRIAN IN BRIEF

Just like economic markets hate uncertainty, so too does any regulated community. Unfortunately, as this issue of the *Practical NLRB Advisor* amply illustrates, uncertainty—and plenty of it—has become the stock-in-trade for the NLRB.

The blame for this rests almost entirely with the Obama Board, which seized upon, and often created, every opportunity to reverse, upend, or modify extant law—all in a transparent effort to achieve a particular set of ideological goals. History teaches us that such excesses eventually spawn correction. Indeed, we are currently witnessing that phenomenon at the NLRB as, for example, a new Board majority attempts to return to a rational and traditional notion of the joint-employer doctrine or to save employer handbooks from the tortured parsings of bureaucratic logomachists. Such change, however, is never linear. It is, more often than not, messy, chaotic, and time-consuming. The problem is, of course, that in the regulatory context, that kind of messiness deprives all stakeholders of certainty.

There is a more than decent argument that the apparently perpetual state of flux at the NLRB is the direct result of its statutory architecture—an imperfect marriage of the executive and the judicial, of policy and law. Whatever the reason, the result is the same. To invert an old adage, the more things remain the same, the more they change. In this issue, as always, the *Advisor* tries to help the reader navigate the churn.

Sincerely,

Brian E. Hayes
Co-Chair, Traditional Labor Relations Practice Group
Ogletree Deakins

About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice so that they can timely consult with their attorneys about specific legal concerns.

Mail regarding your subscription should be sent to editors@ogletree.com or Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Ninety One Peachtree Tower, 191 Peachtree Street NE, Suite 4800, Atlanta, GA 30303. Attn: Client Services. Please include the title of this publication.

HY-BRAND **continued from page 1**

Acme management was relieved to get a call from their attorney in mid-December, informing them that the National Labor Relations Board had reversed the "joint-employer case" and that the company could confidently restore the contractual protections when it renewed its agreement with WeHelpU. The parties inked the new deal in early January, bringing Acme management considerable peace of mind—at least, that is, until the end of February, when outside counsel called again . . .

Back to *Browning-Ferris*

December 14, 2017, brought welcome news: The National Labor Relations Board (NLRB) had reversed its 2015 *Browning-Ferris Industries of California, Inc*. decision. The controversial Obama-era "joint-employer" ruling was a sharp departure from the long-standing test for determining whether, under the National Labor Relations Act (NLRA), two separate entities could be deemed a joint employer of a group of employees. Under the new *Browning-Ferris* test, one entity could be found liable as a joint employer of another entity's employees where the former had only "potential" or "indirect" control over those employees. The decision rattled the business community, especially the franchise industry, contractors, and companies with business models that rely heavily on a contingent workforce. Franchisors were correctly concerned about suddenly being at a heightened risk of liability for unfair labor practices committed by independent franchisees, and manufacturers became rightly wary about the prospect of winding up at a bargaining table alongside their unionized contract labor suppliers. (See the Spring 2016 issue of the *Practical NLRB Advisor* for a detailed look at the *Browning-Ferris* decision and its aftermath.)

Then came *Hy-Brand Industrial Contractors, Ltd.* In a flurry of year-end activity marking the impending departure of then-chairman Philip Miscimarra, the new Trump NLRB overruled *Browning-Ferris* and roundly rejected its reasoning. The Board majority, in a lengthy opinion, explained why *Browning-Ferris* was legally untenable and unsound as a matter of labor policy. The opinion largely tracked the reasoning of Miscimarra's dissent in the *Browning-Ferris* case.

With its decision in *Hy-Brand*, the Board reinstated the traditional test for joint-employer status: to be deemed a joint employer under the NLRA, an entity must exercise *actual* and *direct* control over the "essential employment terms" of the employees in question. Merely reserving potential control—as Acme Co. had sought to do in our hypothetical scenario above—will not be sufficient. *Hy-Brand* restored a substantial degree of clarity and stability in this area of law, and provided the business community with greater assurance that properly designed and administered business models could continue to be utilized without the heightened risk of joint-employer liability.

The reprieve was short-lived, however. On February 26, 2018, the NLRB vacated its *Hy-Brand* decision—effectively restoring the holding in *Browning-Ferris*. The reason: NLRB Inspector General (IG) David Berry issued a memorandum in which he unilaterally determined that Board Member William Emanuel, who voted in the majority in the divided *Hy-Brand* decision, should have recused himself from the case. Emanuel did *not* participate in the 3–0 NLRB vote to vacate *Hy-Brand*; in fact, he was unaware the vote was even taking place.

Was recusal necessary?

Prior to joining the NLRB, Emanuel was a management-side attorney at one of the country's largest employment law firms; and, in accordance with an executive order issued by President Trump, he pledged during his confirmation process that he would recuse himself for a two-year period from the Board's deliberations in any cases involving his own or his former firm's clients. He provided a list of 162 former clients to whom his recusal promise would pertain. Emanuel's law firm had represented the staffing agency involved in the *Browning-Ferris* case—about which Emanuel, the IG acknowledged, had simply forgotten—and the staffing agency was not an active party in the ongoing appeal at any rate. However, his former firm did not represent *any* of the parties in *Hy-Brand*. Thus, since neither Emanuel nor his firm represented any party in *Hy-Brand*, there was no evident basis for requiring Emanuel to recuse himself from participating in the *Hy-Brand* decision. Berry, however, asserted that he was, nonetheless, concerned, given that the case overturned *Browning-Ferris* and that, in his view, the two cases had effectively merged into a single matter. Thus, in a February 21 memorandum from the Office of Inspector General (OIG), Berry wrote that "given the totality of the circumstances, the *Hy-Brand and Browning-Ferris* matters are the same 'particular matter involving specific parties.'" As such, Berry determined that Emanuel should have recused himself from the *Hy-Brand* decision, since he would have been recused from

Browning-Ferris. As noted below, Berry's reasoning and authority in issuing the memorandum have drawn sharp criticism. His articulated basis for the conclusion reached in the memo, however, is as follows:

While the two cases, i.e., *Browning-Ferris* and *Hy-Brand,* began as two distinct and separate matters, "the manner in which the former Chairman marshaled *Hy-Brand* through the Board's deliberative process effectively resulted in a consolidation of the two matters into one 'particular matter involving specific parties,'" Berry reasoned, contending that as a practical matter, "the practical effect of the *Hy-Brand* deliberative process was a 'do over' for the *Browning-Ferris* parties," and since Emanuel would have been recused in *Browning-Ferris,* he should not have participated in *Hy-Brand.*

Of particular concern, in the IG's view, was the "wholesale incorporation of the dissent in *Browning-Ferris* into the *Hy-Brand* majority decision." The *Browning-Ferris* dissent was the result of the Board's deliberative process after the adjudication of the facts and determination of law at the regional level and the submission of briefs by the parties, which included Emanuel's former law firm, and *amici* providing legal arguments for the Board to consider. "Because of the level of the incorporation of the *Browning-Ferris* dissent into what became the Board's decision in *Hy-Brand,* it is now impossible to separate the two deliberative processes," the IG concluded.

The aftermath: disarray

At the time of the *Hy-Brand* decision, *Browning-Ferris* was before the U.S. Court of Appeals for the District of Columbia Circuit on the employer's petition for review. The NLRB had asked the appeals court to dismiss the *Browning-Ferris* appeal and remand the case in light of *Hy-Brand*. Emanuel *was* involved in the decision to seek remand. That action drew fire as well. The Teamsters union, which had intervened in the case, raised objections in the appeals court because the Board had sought and obtained remand without giving the union an opportunity to oppose. The remand also came before the *Hy-Brand* decision overturning *Browning-Ferris* had even become a final order, the Teamsters pointed out in a motion to reconsider, which the appeals court denied. However, in the most recent development in *Browning-Ferris,* the D.C. Circuit, on April 6, granted the NLRB's motion to take the case *back* in light of "extraordinary circumstances." The appeals court said it will hold *Browning-Ferris* in abeyance, though, until the *Hy-Brand* matter is resolved.

One day earlier, NLRB General Counsel Peter B. Robb had issued a memo criticizing the Board's "unprecedented" decision to vacate *Hy-Brand* without Emanuel's knowledge or an opportunity for him to respond to the IG's conclusion he should not have participated in the case. He chastised the three Board members for having "decided on their own to disqualify him from participating in the case—a seemingly unique event in Board history" and urged them to reconsider. Since, however, Board members are empowered to act independently, the general counsel's recommendation to them was, at best, an "advisory" opinion.

The employer in the case has also asked the NLRB to reconsider its decision to withdraw the ruling, contending that Emanuel was not required to recuse himself and asserting that the Board had improperly relied on the IG's report and had violated the employer's due process rights in the process. Hy-Brand's counsel also argued that the three Board members wrongly excluded Emanuel from the deliberations and violated the Government in the Sunshine Act by meeting in secret to do so. In addition, Hy-Brand called for an ethics investigation into Member Mark Gaston Pearce for prematurely disclosing the Board's then-impending action at a conference. According to the employer's motion for reconsideration: "Advance notice of issuance of the board decision by Member Pearce is an egregious breach of confidentiality and the board's deliberative process."

Moreover, no doubt cognizant of the broader ramifications of the ongoing controversy, outside organizations entered the fray in late March, urging the IG to set his sights on Pearce. In addition to claims he improperly announced the impending decision, the Competitive Enterprise Institute alleged that Pearce, a Democrat, had leaked a confidential IG report to Democratic senators, along with other information related to the *Hy-Brand* controversy. The National Right to Work Legal Defense Foundation echoed the call. However, media reports suggest that the IG had already launched an investigation into Pearce's actions.

In addition to sowing internal discord at the agency, the *Hy-Brand* situation has real-world implications for other parties with cases before the Board—and has caused more uncertainty. For example, soon after the 3–0 panel vacated the *Hy-Brand* decision, the painters' union asked the Board to reconsider its decision in *The Boeing Company*, another of the Trump Board's significant December rulings, this one reining in the Obama Board's intrusive scrutiny of employer handbooks

and work rules. The *Boeing* case also was a pivotal one for employers in that it provided a predictable test, going forward, for determining whether or not a work rule would be construed as interfering with protected rights under the Act. The union argued that it had standing to move for reconsideration because the holding in *Boeing* affected a separate matter that it had pending before the agency. In addition, it asserted the *Boeing* decision was invalid because Emanuel, who participated in the deliberations, had a conflict of interest in that case as well. Thus, it is becoming readily apparent that the *Hy-Brand* controversy may present a growing web of problems and become a source of continuing uncertainty.

Bigger questions emerge

The highly irregular developments surrounding the *Hy-Brand* case are troubling on two distinct scores. First, and more specifically, the vacated ruling has once again restored the vague and problematic *Browning-Ferris* joint-employer test, and likely made the prospect of readdressing the issue infinitely more complex. Second, and more broadly, the IG's reasoning for determining that Member Emanuel should not have participated in *Hy-Brand* could have significant impact on the Board's deliberative process in a host of other cases going forward. "If the IG's rationale was correct in prompting the Board to withdraw *Hy-Brand*, it could have implications way beyond *Hy-Brand*," said Brian E. Hayes, Co-Chair of the Ogletree Deakins Traditional Labor Relations Practice Group, and a former NLRB member.

It is important to bear in mind that neither Emanuel nor his former law firm represented *any* party in *Hy-Brand.* The IG's theory for his recusal is based on the questionable conclusion that *Hy-Brand* and *Browning-Ferris* somehow merged into a "single matter." However, as Hayes notes: "Such a conclusion comes very close to predicating recusal on the *issue* in a case, not on the *party or parties* in a case. That has not been the traditional basis for recusal and could create potential issues for almost any Board member who has had prior experience representing parties before the Board." Moreover, the IG's reliance on the fact that the *Hy-Brand* decision reflected elements of the *Browning-Ferris* dissent strikes many observers as singularly misplaced. When there are changes in the ideological composition of the Board, reversals of extant law are often predicated on prior dissents. "The history of Board decision-making is replete with examples of where a new Board majority changes its decisional trajectory by embracing a prior dissent, and doing so does not transform the two matters into one," observed Hayes. Other critics have noted that while the IG has correctly noted the institutional concern over the integrity of the Board's deliberative process, his own conclusion that the two cases had to have somehow "merged" represents an unfounded and untoward intrusion on that same deliberative process by the IG himself.

These and other concerns aside, the IG nonetheless concluded in his memo that Emanuel's participation in the *Hy-Brand* decision "demonstrates that the Board's current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board's deliberative process from actual conflicts of interest and the appearance of such." However, Emanuel's conflict-of-interest concerns are not unique. Prior NLRB members have been faced with the prospect of deciding whether they should properly involve themselves in deliberations regarding parties with whom there is a prior client relationship. As Hy-Brand's counsel pointed out in its recently filed motion for reconsideration, former Board member Craig Becker—who was previously an attorney for the Service Employees International Union (SEIU), and an especially controversial Obama nominee—declined to recuse himself from a case in which an SEIU local was a party. Despite objections, Becker reasoned that whether to recuse was his personal decision to make—a prerogative not afforded Emanuel—and then decided that since he had not represented that particular local, there was no conflict precluding his participation. Comparatively, Emanuel's tangential client in the *Browning-Ferris* case was even farther removed from *Hy-Brand*. Such facts add weight to the arguments against the IG that his actions in the case—and not Emanuel's—have marked the radical departure from the norm while also imposing an expansive recusal standard that NLRB observers of all political stripes should find problematic.

Unfortunately, the post–*Hy-Brand* slope now appears to be getting even more slippery. Thus, there is currently a motion pending to bar Emanuel from participating in any case addressing the Board's much-litigated *D.R. Horton* holding that mandatory class and collective action waivers violate the NLRA. The argument is that, because he was involved in cases challenging that controversial holding while at his prior law firm, he should be precluded from deliberating the issue as a Board member. By that measure, Board members would be excluded from participating in cases not just because of a particular party or matter, but based on the issue before the Board. This is precisely the problem that Hayes noted earlier.

A more permanent solution?

The original *Browning-Ferris* decision prompted legislation in both houses of Congress to overrule its overbroad joint-employer standard. The Save Local Business Act (H.R. 3441), a bipartisan measure that passed in the U.S. House of Representatives in 2017, would amend the NLRA (as well as the Fair Labor Standards Act) to undo the 2015 decision legislatively. Specifically, both statutes would expressly define "joint employer" as one that exercises direct, actual, and immediate control over the essential terms and conditions of employment.

As the *Hy-Brand* debacle makes clear, a more permanent legislative solution—one that would take the joint-employment question out of the NLRB's hands altogether—would bring welcome relief, as it would ensure that a future pendulum swing at the Board will not again leave businesses vulnerable to the vagaries of any transitory NLRB policy. Recent reports indicate there is a renewed interest in the joint-employer issue on Capitol Hill.

Meanwhile, the NLRB announced it will consider issuing a formal rule to adopt a joint-employer standard. To that end, the agency included a submission in the agency's filing in the Unified Agenda of Federal Regulatory and Deregulatory Actions at the request of Chairman John F. Ring. "Whether one business is the joint employer of another business's employees is one of the most critical issues in labor law today," Ring said. "The current uncertainty over the standard to be applied in determining joint-employer status under the Act undermines employers' willingness to create jobs and expand business opportunities. In my view, notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the standard ought to be."

In a press statement, the Board indicated it already has begun to undertake the process necessary to consider rulemaking (although members Pearce and McFerran, the two Democrats on the Board, did not participate in the decision to include the rulemaking proposal in the regulatory agenda). Any proposed rule would require approval by a majority of the five-member NLRB, and the next step would be to issue a notice of proposed rulemaking. Ring said the Board plans to issue a proposed rule "as soon as possible," followed by a comment period allowing the public to weigh in on the issue, which "affects millions of Americans in virtually every sector of the economy."

At this point, the scope of *Hy-Brand's* implications are still being sorted out and a host of legal questions remain open. Among those many unresolved issues are the following:

- Was the IG's action within his jurisdictional purview?
- Does the IG even have authority to attempt to preclude or compel the recusal of a Board member? If so, is there a mechanism for challenging the IG's determination?
- Was the action of the three remaining Board members in vacating the *Hy-Brand* decision lawful or effective?
- What is the proper standard or limit on recusal going forward?
- If Member Emanuel's recusal holds, does that mean that any joint-employer case is inexorably tied to *Browning-Ferris*, and, if so, does that mean that Emanuel cannot participate in *any* joint-employer case?
- If the recusal standard is essentially issue-based, are other Trump Board decisions subject to challenge?

It is unclear at this point how or when these questions, and the others that *Hy-Brand* has spawned, will finally be clarified.

Takeaway for employers

With the Senate confirmation of John F. Ring, the NLRB once again has a 3–2 Republican majority. Whether that means the Board will revisit its decision to vacate *Hy-Brand* is unclear. If Emanuel must sit out such a vote, which remains in dispute, then the matter will continue to be deadlocked at 2–2. Failing that, the general counsel could tee up another joint-employer case for the Board to decide at the earliest opportunity; when, however, is unclear.

In the meantime, *Browning-Ferris* remains good law, and its loose joint-employer standard is controlling. Franchises and businesses that utilize subcontractors and contingent staffing models must be cognizant of the heightened risk of being deemed a joint employer for the foreseeable future. Hold off on dusting off your pre–*Browning-Ferris* contract labor agreements and remind your human resources department and line managers of the need to refrain from exercising direct supervisory control over your subcontractors and staffing agencies' employees. ■

An agency in flux

Much has changed at the National Labor Relations Board (NLRB) since the beginning of the Trump administration. The turnover was slow-going at first, but by the second half of 2017, a new Republican Board majority was seated and a new Republican general counsel (GC) confirmed. The personnel changes did not end there, however. In December, Board Chairman Philip Miscimarra's term ended, leaving an evenly divided four-member Board with one vacant seat. That vacancy was only recently filled by John F. Ring, freshly confirmed by the Senate and promptly tapped by President Trump to serve as Board chairman.

There has also been significant discussion of change at the agency's regional office level, with General Counsel Peter B. Robb pursuing a reform and restructuring agenda that would streamline the agency and further President Trump's goal of cutting the costs of operating the federal government. Perhaps not surprisingly, Robb's proposed "significant reorganization" has been met with both consternation and resistance among many of the agency's career employees. In a recent general counsel memorandum, he outlined some of his proposed changes.

Of course, the routine work of the agency continues on amidst the churn, and as is the custom, the GC's office reported on the Board's 2017 activities to the Practice and Procedure Under the National Labor Relations Act Committee (P&P Committee) of the American Bar Association (ABA) Section of Labor and Employment Law. Robb's memorandum gives an overview of the key statistics for last year.

Ring sworn in as Board member

John F. Ring has been sworn in as NLRB member and named chairman. Ring is former co-leader of the labor practice group at a management-side law firm. He began serving a five-year term on the Board on December 17, 2017 (the departure date of Philip Miscimarra, whom Ring replaced). Notably, while he represented employers throughout his legal career, he put himself through college and law school by working for the Teamsters union, which affords him a vantage point from both sides of the labor-management divide, he told senators during his Senate confirmation hearing.

Ring fills the all-important fifth seat on the Board, restoring a 3–2 Republican majority. However, like Member William Emanuel (as discussed in detail in our lead story), Ring has pledged to recuse himself from cases where a potential conflict of interest arises due to his or his former firm's representation of involved parties. Thus, in some instances this Republican majority may prove tenuous, as Ring and Emanuel determine if they need to recuse themselves from participation in a particular case. If such cases are significant "full Board" decisions, a single recusal would likely result in a 2–2 split and could result in an inability to address currently contentious issues of Board law.

Agency reforms proposed

NLRB General Counsel Robb, who took office last fall, moved swiftly to make his mark on the agency and to make changes in both its prosecutorial priorities and its operational structure. The GC oversees the Board's regional offices, and soon after stepping into the position, Robb announced his intent to streamline the offices and the agency to improve efficiency and control costs. Among his proposals: the consolidation of field offices, additional budget cuts, and revising investigative procedures and other processes for handling unfair labor practice charges and union representation cases. The current practices have been in place for decades, notwithstanding an ongoing decline in NLRB case filings. The recommendation that drew the most fire is to centralize more decision-making authority in the agency's Washington, D.C., headquarters.

In a March 14 GC memorandum, Robb said the goal is the improvement of "organizational decision making, elimination of unnecessary levels of management and administrative

support, maximization of employee performance, [and] reduction in travel and other case processing expenses." The memo also indicates the GC's office will solicit input from both headquarters and field staff in formulating changes to case processing, and any changes would be implemented only after comments from agency employees have been reviewed and evaluated. Changes related to the structure of the field offices will be open for public comment prior to implementation, as appropriate, according to the memo, with a target effective date of October 1, 2018. However, the memo notes that "the process [is] in its incipient stages and no firm timetable has been established."

The release of the GC's annual report and memo preceded the appearance by several senior NLRB officials at the ABA's annual Midwinter Meeting of the P&P Committee of the ABA Section of Labor and Employment Law. The primary purpose of their attendance was to respond to and discuss the ABA committee's concerns and questions about agency case-handling procedures and the proposed revisions to them. Following the tradition of prior GCs, Robb shared the committee members' concerns and the agency's responses to numerous questions raised by attendees.

The NLRB's rank and file quickly voiced displeasure at the reforms proposed by the GC. About 400 employees—a quarter of the NLRB workforce—signed a letter to Senate Appropriations Committee Democrats lobbying against any cuts to the agency's budget. The omnibus budget bill passed on March 23 spared the agency from any drastic spending cuts. However, Robb made it clear to the NLRB Professional Association (which represents agency staff at the Washington, D.C., office) that cuts will proceed nonetheless, given that Congress might slash the Board's budget for 2019.

GC reports on 2017 numbers

The GC's March memo also provides case statistics and additional data about the NLRB's activities in 2017:

- **Representation elections:** There were 1,404 elections, with unions winning 66 percent; 1,205 certification of representation petitions were filed, with a 71 percent union win rate; 173 decertification petitions were filed, with unions winning 32 percent; and 26 majority support certification petitions were filed by employers, with a 30 percent union win rate.

- **Unfair labor practices:** 19,280 unfair labor practice (ULP) charges were filed; merit was found in 38.6 percent; 95 percent were settled; 300 resulted in merits dismissals; 1,263 complaints were issued; and the agency's litigation win rate was 85 percent.

- **Board appeals:** 1,425 appeals were received by the Office of Appeals; 1,489 were processed; 19 cases were sustained (1.28 percent); the median number of days to process cases was 35; the median number of days to process sustained cases was 79; and while the average number of days an appeal was pending is not specifically computed, the agency said it was a little over 35 days, taking into account that the 19 sustained cases took more than 35 days.

- **10(j) injunctions:** The regional offices received 113 10(j) requests; the GC sent 38 cases to the Board requesting authorization for 10(j) proceedings; and the Board authorized 37 cases, 9 of which were pending resolution at the end of the fiscal year, 17 of which were litigated to conclusion by the end of the fiscal year, resulting in 10 wins (8 full/2 partial), 7 losses, and 11 settlements or adjustments.

Other NLRB and labor developments

Here is a brief summary of other noteworthy developments in recent months:

At the Supreme Court

Deep split over *Janus*. Argued before the *Supreme Court of the United States* on February 26, *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (16-1466) is one of the most-watched cases on the Court's docket. It will determine whether or not public sector unions will continue to be permitted to collect so-called "agency," or "fair share," fees from bargaining unit members that choose not to become dues-paying union members. Central to the outcome is the question of whether the fees amount to compelled speech by those who do not wish to join or support the union, in violation of the First Amendment. The case invites the Court to overturn its 1977 *Abood v. Detroit Board of Education* decision, which held it constitutional for a government to compel employees to pay such fees to an exclusive representative for representing them in collective bargaining with the government over policies that affect their profession. The Court's June 2014 decision in *Harris v. Quinn* questioned the constitutional and legal foundation articulated in *Abood*, but let it stand because it found the plaintiffs were not "full-fledged" state employees; thus, *Abood* did not apply. Notably, *Harris* involved the Illinois Public Labor Relations Act, which is also at issue in *Janus*. A ruling against the unions could greatly diminish both the revenue and resulting political power of public employee unions.

Antitrust ruling stands. In March, the High Court let stand a decision from the U.S. Court of Appeals for the Ninth Circuit holding that a labor union and a multi-employer bargaining association were immune from antitrust liability stemming either from their filing of alleged sham litigation or their allegedly anticompetitive collective bargaining agreement. The petition for certiorari filed by the employer in *Int'l Longshore and Warehouse Union v. ICTSI Oregon, Inc.,* implored the justices to take up the case because it "involves an issue this Court has not *expressly* decided: whether an employer and union can enter into and enforce an agreement to engage in conduct that is inimical to federal labor policy and violates the NLRA, and nonetheless be protected from scrutiny under the antitrust laws by the nonstatutory labor exemption."

Circuit court decisions

Work rule case remanded to Board. The U.S. Court of Appeals for the District of Columbia Circuit remanded a restaurant's petition for review of an NLRB decision finding that the employer had committed numerous unfair labor practices, including promulgating and maintaining unlawful work rules. In an unpublished order, the appeals court granted the Board's remand request, giving the agency an opportunity to revisit its decision, and the underlying work rule provisions in question, in light of the Board's December 2017 ruling scrapping the test that it had used to invalidate those provisions. In *Grill Concepts Services, Inc.*, the Board found that the employer committed multiple unfair labor practices, several of which involved allegations that certain handbook provisions, including confidentiality and online communications rules, violated the NLRA. Those findings, however, rested on the NLRB's "reasonably construe" test, which the agency overruled in its December 2017 *Boeing Co.* decision. The Board asked the appeals court to remand the case so it could determine whether the employer's work rules violated the Act under the new framework articulated in *Boeing* (*Grill Concept Services, Inc. dba The Daily Grill v. NLRB*, January 29, 2018, unpublished).

Improper remedy for dues checkoff rescission. Addressing for the fourth time this long-running case, the U.S Court of Appeals for the Ninth Circuit found the NLRB clearly abused its discretion by declining to award the standard remedy of make-whole relief in a case involving now-defunct hotels that unilaterally ceased union dues checkoff after expiration of a bargaining agreement. The Board improperly found the employers "correctly" believed they were following settled law at the time they ceased the dues checkoff. Further, its prospective relief was the same as no relief at all under the circumstances, said the court, vacating the order and urging the Board to "move swiftly on remand" to award the standard remedy for the Section 8(a)(5) violation. Although the court had previously found a violation of the NLRA and remanded to the Board to determine what relief was warranted, the Board declined to award make-whole relief—the standard remedy when an employer unlawfully ceases union dues checkoff—instead awarding the union prospective-only relief. Nor did it provide a valid explanation for departing from its standard remedy

in dues checkoff cases. Its reliance-based explanation was improper, said the court, because it was unreasonable for the employers to rely on Board precedent that had never been applied in a reasoned manner in the absence of a union security clause, and because the Board's other explanations were similarly erroneous. Moreover, by ordering prospective-only relief against defunct entities, the Board effectively ordered no relief at all and therefore did not effectuate the policies of the Act (*Local Joint Executive Board of Las Vegas v. NLRB*, February 27, 2018).

Union election not tainted. The NLRB did not unreasonably discount two threats that an employer claimed tainted a union election victory—an alleged threat to call U.S. Immigration and Customs Enforcement (ICE) if the union lost the election, and the union's use of an election observer who had been fired four days earlier for threatening conduct involving an "airsoft" gun. Affirming the Board's determination that the employer violated the NLRA by refusing to recognize the union, the D.C. Circuit held that because there was no evidence connecting the discharged employee's behavior to the election or to the union itself, or that the union was responsible for any ICE threats that could potentially coerce employees to vote for it, the Board did not abuse its substantial discretion in certifying the election results (*Equinox Holdings, Inc. v NLRB*, March 6, 2018).

Bargaining order inappropriate. The U.S. Court of Appeals for the Second Circuit found that substantial evidence supported the Board's findings that the manner in which an employer tried to dissuade employees from voting to unionize—including reinstatement of Sunday and holiday pay, as well as its demotion of a pro-union employee—violated the NLRA. Although the court enforced most components of the Board's remedial relief order, it denied enforcement of its bargaining order, explaining that it failed to properly account for changed circumstances during the two-year period between the unfair labor practices and its decision, particularly given the significant employee and management turnover and the importance of employees' free choice. The Board afforded far too little weight to changed circumstances in determining whether a rerun election would likely be fair when it denied the employer's motion to reopen the record to introduce evidence of significant employee and management turnover during the intervening two-year period. The law of the Second Circuit is that the relevant circumstances must be measured at the time of the issuance of a bargaining order, not as of the time of the election (*Novelis Corp. v. NLRB*, March 15, 2018).

New newspaper owner was a successor. The new owner of a Puerto Rican newspaper was a successor employer, held the D.C. Circuit, denying the employer's petition for review of a Board decision. The employer argued that it made changes to the business model that defeated substantial continuity between the old and new enterprises. However, the appeals court held that changes such as modifications to the board of directors, a new motto for the paper, and the purchase of a new copy machine were not the kinds of business changes that defeat continuity. Also rejected was the employer's argument that the hiring of part-time inserters expanded the number of employees in the previous bargaining unit to the point that a majority of employees were not former unit members, thus defeating the presumption of majority support for the union. The Board found that the inserters should not be included in the bargaining unit because their positions were substantially different; they were less-skilled, part-time employees who made significantly lower wages and did not receive health benefits. In fact, they were not even allowed to speak to the full-time employees. Were it deciding this case initially (not as a successorship), the Board could easily have concluded that an appropriate unit could exclude the part-time inserters. And in a successor case, a historical unit will be found to be appropriate if the predecessor employer recognized it, even if the unit would not be appropriate if being organized for the first time. Given that standard, the Board's decision as to the bargaining unit and its determination that the employer was a successor were not in error (*Publi-Inversiones de Puerto Rico, Inc. v. NLRB*, March 30, 2018).

NLRB misapplied *Jefferson Standard* test. The D.C. Circuit rejected the NLRB's holding that an employee who made disparaging statements to third parties about his electric company employer was protected under the NLRA. The employee was discharged for making false or disparaging statements about the company during two minutes of testimony before a Texas senate committee. However, there was no objective finding either that the employee disclosed his subjective motive to pressure the employer into concessions during labor negotiations, or that the subject of his statements was connected to an ongoing labor dispute. The Board essentially skipped this first requirement of the *Jefferson Standard* test: that the

statement is related to an ongoing dispute between the employees and the employers. The appeals court remanded the decision so that the Board could articulate the principles underlying its consideration of whether an employee's third-party statements constitute "such detrimental disloyalty" to his employer that it is not protected under the Act (*Oncor Electric Delivery Co. LLC v. NLRB*, April 13, 2018).

Home addresses may not be enough. The *Excelsior* rule requires an employer to provide a union with all employee address information in its possession—not just home addresses—to facilitate the union's ability to communicate with potential voters, the U.S. Court of Appeals for the Eleventh Circuit held. The employer provided the union with a list of eligible voters and their home addresses. However, 60 to 70 percent of employees' personnel files contained a P.O. box address as a mailing address, yet the list provided by the employer included only residential addresses for 37 of the 39 employees. Consequently, 22 of the 39 meeting invitations sent out by the union were returned to the union as undeliverable, and the meeting drew only 7 employees. Noting that the *Excelsior* rule is designed to ensure an accurate and informed vote on the question of union representation, the appeals court said an employer violates the rule if it supplies addresses that it knows are not likely to allow the union to reach employees by mail. The court rejected the employer's contention that the Board had issued a "newly articulated" extension of *Excelsior* when it found that the employer should have furnished the P.O. box mailing addresses (*Transit Connection, Inc. v. NLRB*, April 13, 2018).

Board rulings

Lawsuit aimed at union boycott unlawful. A real estate investment trust (REIT) that owned a hotel acted unlawfully by filing and maintaining a lawsuit against a union in response to the union's encouragement of a consumer boycott of the hotel, ruled a three-member panel of the NLRB. The Board first found that the REIT could be liable under the NLRA even though a management company employed the hotel's employees. Further, the Board found that the lawsuit's tortious interference claims were preempted by the Act and that both tortious interference and defamation claims were independently unlawful because they were baseless and motivated by a desire to retaliate against the union (*Ashford TRS Nickel, LLC*, February 1, 2018).

Company was "perfectly clear" successor. A company that took over school bus transportation services from the school district was a "perfectly clear" successor, a divided three-member NLRB panel ruled, and therefore violated the NLRA when it failed to provide a union with notice and an opportunity to bargain before imposing initial terms and conditions of employment. The employer became a "perfectly clear" successor with an obligation to bargain over initial terms on the date that it first expressed an intent to retain the predecessor's employees without clearly announcing an intent to establish different initial terms of employment. On March 2, unit employees were told the school district had agreed to a contract and that the company would offer employment to current employees who submitted an application and met its hiring criteria. A company representative indicated the company typically hired 80 to 90 percent of an existing workforce when it assumed operations and, if the workforce was unionized and it hired 51 percent of the employees, it would recognize the union and negotiate a new contract. About two weeks later, however, the company distributed a memo inviting the employees to apply for employment and setting forth several terms and conditions of employment that were different from the terms set forth in the bargaining agreement under which the employees had worked. In finding that the employer was a "perfectly clear" successor, the Board noted that well before the formal hiring process began, the company clearly and consistently communicated its intent to retain the bargaining unit employees. In a partial dissent, then-chairman Marvin E. Kaplan argued that the employer gave notice of different initial terms more than a month before it extended job offers to the employees. Therefore, Kaplan would have found that the company had the right under *Burns* to implement initial employment terms without first consulting or bargaining with the predecessor's union (*First Student Inc., a Division of First Group America*, February 6, 2018).

Substantial and representative complement; duty to bargain. A company that took over a contract to provide paratransit services had an obligation, as a legal successor, to recognize and bargain with the union representing the predecessor's employees as of June 29, 2015, the date it assumed that company's operations, a three-member NLRB panel held. The Board rejected the company's claim that it did not reach a substantial and representative complement until several months later, when it achieved its "ultimate work force totals," at which time only 20 of its 41 employees

had been unit employees of the predecessor. The company had relied on *Myers Custom Products,* where the Board found an employer's initial refusal to bargain did not violate the NLRA, as it had a definite plan to expand its workforce in a short period of time and the parties stipulated that it planned, before commencing operations, to take two to three months to select and train a full employee complement. Here, though, the parties did not stipulate, and there was no evidence the company had definite plans to substantially increase its workforce within a short and specified time period. In fact, the company only sporadically increased the size of its workforce, adding only nine employees over five months. Thus, it achieved a substantial and representative complement when it assumed operations on June 29—the point at which it had substantially filled its job classifications, was providing normal paratransit service in the same manner as did the predecessor, had no definite plan to expand, and a majority of the employees whom it employed had been represented by the union at the predecessor company (*Ride Right, LLC*, February 8, 2018).

Employee lawfully fired for security breach. A Chicago hotel operator did not violate the NLRA when it fired an employee who used a security passcode to bring nonemployees to a secured area of the hotel in order to present a petition to management about the hotel's working conditions. A three-member NLRB panel ruled that the employee's misconduct in the course of his otherwise protected concerted activity was so egregious as to lose the Act's protection. After leaving a union demonstration, the employee led 20 people through a secured access area in the hotel to deliver the petition to the general manager. Although only six people in the group worked at the hotel, the employee lied to a security guard, telling him that everyone was an employee. In order to reach management offices, he entered a security passcode on a keypad on a locked door. Upon reaching the general manager's office, part of the group of nonemployees remained outside unattended in the secure area for several minutes. The employee's conduct "flagrantly violated the hotel's security protocol and unnecessarily placed at potential risk" the security of other employees and hotel property, the Board stated. Nor could his security breach be brushed aside as an impulsive act—as the Board saw it, this was "a predetermined course of action." He knew there were nonemployees in the group and that he would be breaching the security protocol by acting as he did (*KHRG Employer, LLC dba Hotel Burnham & Atwood Cafe*, February 28, 2018).

New overtime policy unlawful. An employer violated the NLRA when, after it was sued for unpaid overtime, it implemented a new overtime policy requiring employees to get overtime preapproved and then approved overtime only for those employees who were not involved (or whom it believed were not involved) in the lawsuit and did not support the union. The Board stressed that it did not intend to suggest an employer could *never* lawfully respond to a lawsuit by issuing a policy that limited unauthorized overtime work if motivated solely by legitimate business concerns. But that's not what happened here. In this case, the employer's statements and actions revealed that the "overriding motivation was unlawful animus against Section 7 activity, not reducing its overtime exposure" (*Tito Contractors, Inc.*, March 29, 2018).

Advice memos

The NLRB General Counsel's Division of Advice recently released a series of advice memos including guidance documents dating as far back as 2009 on such issues as a "gig" worker's employment status under the NLRA (*Postmates, Inc.*); the prospect of extending *Purple Communications* to Internet- and computer-usage policies (*Team Fishel*); threatening workers' immigration status in response to an organizing campaign (*The Washington University*); and other trending labor matters.

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Up next

In our next issue of the *Practical NLRB Advisor*, we'll discuss the decision of the Supreme Court of the United States in *Epic Systems Corp. v. Lewis* and related cases addressing class arbitration waivers, and what the landmark ruling means for employers seeking to enforce agreements to resolve employment disputes through individual arbitration.

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